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In the Supreme Court of the United States

No. 301, October Term, 1961

GEORGE WEIGEL,

Petitioner,

v.

PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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GEORGE WEIGEL,

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PARTENWEEDEREI, MS BELGRANO and RUDOLPH A. OETKER,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on February 8, 1962.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court on the issue of liability as between petitioner and respondents (R. 16-36), printed in appendix A hereto, *infra*, p. 31, is reported in

189 F. Supp. 103. The opinion of the District Court on the issue of indemnity between respondents and a third-party (R. 38-52), printed in Appendix A hereto, *infra*, p. 46, which issue is not involved in this petition, is reported in 188 F. Supp. 605. The opinion of the Court of Appeals (R. 589-599), printed in Appendix A hereto, *infra*, p. 17, is reported in 299 F.2d 897. The orders of the Court of Appeals (R. 603-604), holding in abeyance further proceedings between respondents and third-party pending determination of this cause in this Court are reported at 302 F.2d 730.

JURISDICTION

The judgment of the Court of Appeals was entered on February 8, 1962 (R. 588). A timely petition for rehearing was filed and was denied on March 12, 1962 (Supplemental Transcript of Record). On May 4, 1962, by order of the Chief Justice, the time within which a petition for certiorari might be filed was extended to and including August 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Is a longshoreman working on the dock, engaged in moving cargo under the ship's tackle to be loaded aboard the vessel, entitled to a warranty of the seaworthiness of the vessel? (The Court of Appeals held that he is not.)

2. Does a workman claiming the benefit of the war-

ranty against unseaworthiness have the burden of introducing evidence to prove that the work he did was traditionally done by seamen? (The Court of Appeals held that petitioner had failed to meet his burden of proof, and reversed the trial court's finding that petitioner was performing a part of the ship's service in loading her cargo.)

3. Does a shipowner owe a duty to a longshoreman working on the dock, engaged in moving cargo under the ship's tackle to be loaded aboard the vessel, to provide him with a safe place to work? (The Court of Apeals held that the ship owner owed no duty to provide petitioner with a safe place to work.)

4(a). Was the Court of Appeals correct in holding that there was no evidence to sustain the trial court's finding of fact that the shipowner was negligent in failing to make a proper inspection of the appliance which cause the injury to the petitioner?

(b). Is the decision of the Court of Appeals in conflict with the subsequent decision of this Court in *Salem* v. *United States Lines* — U.S. —, 8 L. Ed. 2d 313 (May 28, 1962) in holding that the petitioner was obligated to introduce evidence to establish a standard of inspection?

STATEMENT

On October 10, 1958, petitioner was employed as a longshoreman (R. 472) by a stevedore company engaged in loading and discharging cargo for the M. V. Bel-

grano (R. 5), a ship lying in navigable waters of the United States (R. 4). Petitioner was assigned to a gang at hatch no. 2 (R. 229). He was driving a tractor on the dock, delivering a carload of lumber under ship's tackle for loading aboard the vessel (R. 472, 477), when one of the ship's booms at hatch no. 1 fell (R. 89), striking him and causing him severe injuries (R. 24).

Petitioner instituted this action in admiralty in the United States District Court for the District of Oregon as a libel in rem against the vessel and in personam with foreign attachment against the shipowner (R. 4, 5). The District Court had jurisdiction of the cause as an admiralty matter by reason of the provisions of c. 646, 62 Stat. 931, amended May 24, 1949, c. 139, § 79, 63 Stat. 101, 28 U.S.C. § 1333; and by c. 526, 62 Stat. 496, 46 U.S.C. § 740, extending the admiralty jurisdiction to include cases of damage to person occurring on land, when caused by a vessel on navigable water. The operating manager of the vessel appeared as claimant (R. 4). The shipowner and the claimant (hereinafter "respondents") impleaded the stevedore company as a third party, claiming indemnity (R. 4).

The trial court, Hon. William G. East, wrote an opinion (R. 16-36) holding that petitioner was entitled to prevail, and entered a decree which awarded him damages of $41,207.55 (R. 36-38). In a subsequent opinion, the court decreed that respondents were entitled to indemnity from the third party (R. 38-52).

The trial court found that the falling of the boom

was caused by the failure of a pawl and ratchet device to operate properly, because the pawl was stuck tight and failed to fall freely into the notch provided for it, as it was supposed to do (R. 21-22). He therefore found the vessel unseaworthy. He also found that "petitioner at the time of the accident was engaged in performing a part of the ship's service as a longshoreman in the process of loading and stowing her cargo" (R. 22-23), and was entitled to a warranty of the seaworthiness of the vessel.

The evidence regarding the condition of the pawl (also referred to as a dog) at the time of the accident on October 10 is not now in dispute. It was not functioning properly (R. 184-187). When the boom is being raised, the clicking sound which should be made by the pawl, if operating properly, is clearly audible (R. 184-187).

The pawls were all in good working order and fell freely into the notches on October 6 and 7, when the vessel was in Vancouver, B. C. (R. 525, 562). From Vancouver, the vessel proceeded to Portland, where it arrived early on the morning of October 9. On that day, the boom in question was raised by members of the crew. They testified that it operated properly and they could hear the click (R. 467, 468; 515, 517). Later that same morning, however, when the longshoremen working that hatch had to move the boom, they found the pawl jammed stuck so tight that it could not be moved by hand, and had to use a 2"x4" to pry it down into the ratchet (R. 84-85, 130).

Nothing further was done about the condition of the pawl, however, and petitioner was hurt when the boom was raised on the following day, and the pawl failed to drop into place (R. 184-187). The trial court concluded that, "Reasonable inspection would have disclosed the malfunctioning of the pawls known to the longshoremen the day before" (R. 22).

Respondents and the third party both appealed to the Court of Appeals for the Ninth Circuit which reversed the judgment in favor of petitioner (R. 599). A timely petition for rehearing was denied without opinion (Supp. Tr.). Subsequently, the Court of Appeals entered Orders suspending further proceedings on the indemnity issue pending the outcome of the instant petition for certiorari (R. 603-604).

On appeal, the finding of the trial court that the vessel was unseaworthy was not challenged by the respondents (R. 592). The Court of Appeals held that petitioner, as a dock-working longshoreman, who "did not participate in loading the lumber onto the vessel or in stowing it" (R. 595), was engaged in "an operation preliminary to, but separate from the work of loading lumber onto the vessel." (R. 595). As such, he was held not entitled to the benefits of the warranty against unseaworthiness (R. 596). The Court of Appeals also held, without intending "to lay down a fixed line of demarcation between 'seamen's work' and 'shoreside work'," that the burden was upon petitioner to prove that the type of work he was doing was traditionally done by seamen, and that he had failed to meet that burden (R. 596).

On the issue of negligence, the Court of Appeals held that the shipowner had no duty to provide the petitioner with a safe place to work (R. 599), and that there was no evidence to support the trial court's finding of fact regarding inspection (R. 599).

REASONS FOR GRANTING THE WRIT

Importance of Question Presented

The correctness of this Court's decision in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, holding that the benefits of the doctrine of seaworthiness are available to persons doing the work of seamen, has been much debated, but no one questions the importance of the doctrine to those whom it affects. This case squarely presents the question of whether the protection of that doctrine is to be available to a substantial class of workmen; namely, those who participate in the process of loading (or unloading) the vessel by transporting cargo between its last place of rest and ship's tackle. The trial Court found that petitioner was entitled to a warranty of seaworthiness because he was engaged in the work of loading the vessel, but the Court of Appeals held that the work he was doing was "preliminary to, but separate from" loading.

The question is peculiarly important to those affected because workmen injured ashore by an unseaworthy condition of a vessel are not entitled to the protection of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq. Instead, they are relegated to the varying and frequently inadequate remedies af-

forded by state law,[1] although their injuries are subject to the maritime and admiralty jurisdiction by 46 U.S.C. § 740.

Because state compensation is often inadequate, a third-party recovery is a matter of the utmost concern to a workman injured on the dock. As exemplified in this case, in which unseaworthiness of ship's gear is admitted, but the Court of Appeals holds that there is no evidence of negligence, the protection of the doctrine of unseaworthiness is frequently crucial to recovery.

We are thus dealing with an issue of law—namely, is a dock-working longshoreman entitled to the warranty—which is of major importance to a substantial number of workmen. This Court, in *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, deemed an analogous issue arising under the Jones Act, 46 U.S.C. § 688, to be of sufficient consequence to justify the granting of certiorari. Similar considerations justify the granting of the writ in the instant case.

In addition to the question whether petitioner is entitled to the benefits of the warranty, the decision below has wider implications, raising fundamental ques-

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[1] In this case, for example, petitioner suffered serious and permanent injuries, which were not totally disabling (R. 24-25). They were of such a nature as to be rated as unscheduled injuries under both the State and Federal Compensation Acts. Had petitioner been covered by the Federal Act, the maximum amount he could have received for his permanent injury was at that time $17,280.00, and is now $24,000.00. 33 U.S.C. Sec. 914 (m). Under the applicable Oregon statute, the maximum which can be awarded for an unscheduled permanent partial disability is $6,742.50. ORS 656.214 (2), (4).

tions concerning the applicability of the doctrine which have not yet been decided by this Court. In *Halecki* v. *United N. Y. & N. J., etc.*, 358 U.S. 613, this Court held that the plaintiff was not entitled to the protection of the doctrine, because he was not doing work traditionally performed by seamen. The opinion fails to suggest the criteria to be used in determining that issue.

In this case, the Court of Appeals holds that the burden was on petitioner to prove—presumably by oral, expert testimony—that he was engaged in work traditionally done by seamen (R. 596). The Court of Appeals comments that the uncontradicted expert testimony was to the contrary (R. 595). It refers to testimony introduced by the third party that, in the period since 1910, seamen did not work beyond ship's tackle (R. 473, 483, 493).

If the applicability of the warranty to a particular task is to be determined by expert testimony, as a disputed issue, the consequences to litigation in this field are extreme. There is no reason why every case should not become a battleground of expert testimony concerning the traditional work of seamen. If the defendants can produce witnesses to testify that seamen did not "traditionally" do the work of loading and unloading the vessel (*Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85), of carpentry aboard the vessel (*Pope & Talbot* v. *Hawn*, 346 U.S. 406) and the numerous other employments which have been held by lower courts to be entitled to the warranty as a matter of law, it will be a jury question in every case, based upon conflicting

testimony, whether the doctrine applies.[2]

If it is to be the rule that the workman must prove that his work was "traditionally done by seamen," it is clearly necessary that some content be given to that phrase. What is meant by "traditional" in this context? One commentator suggests that the period from 1910 to 1920 should be adopted as the index (Norris, Maritime Personal Injuries, § 48A, pp. 122-125 (1959)), and the evidence introduced by third party in this case was apparently based upon that suggestion (R. 473, 483, 493). This Court, however, by its citations in *Sieracki* to *Florez* v. *The Scotia*, 35 F. 916 (D.C.) and *The Seguranca*, 59 F. 908 (D.C.), as well as by its decisions in *International Stevedoring Co.* v. *Haverty*, 272 U.S. 50, 52, and *Atlantic Transport* v. *Imbrovek*, 234 U.S. 52, 62, evidently had reference to a period of time at least well before the turn of the century. But if the issue of "tradition" is to be one of fact, some standard against which evidence can be judged must be supplied.

In a closely parallel context, that of determining who is a member of a crew of a vessel, so as to be entitled to a cause of action under the Jones Act, this Court has taken a different approach. The issue of membership in a crew has been held to be one of fact, but is determined upon the basis of duties and functions of

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[2] The ready availability of such testimony is illustrated by *Litwinowicz* v. *Weyerhaeuser SS Co.*, 179 F. Supp. 812, 818 (E.D. Pa., 1959), in which, more than a decade after *Sieracki*, the defendant submitted a memorandum "which purports to demonstrate 'the fallacy of the rather widely held concept that the work which is today performed by longshoremen was formerly performed by members of the crew.'"

the injured workman, rather than upon expert testimony as to who was "traditionally" a member of a crew. *Senko* v. *Lacrosse Dredging Corp.*, 352 U.S. 370; *Butler* v. *Whiteman*, 356 U.S. 271. This appears to be the line of approach taken by the trial court here. He concluded (R. 22-23):

> ". . . [T]hat the libelant at the time of the accident was engaged in performing a part of the ship's service as a longshoreman in the process of loading and stowing her cargo. Particularly he was engaged in moving or bringing this lumber cargo from its last place of rest following handling by others to a position on the dock shipside in order to be reached by the ship's gear and tackle."

The test of what constitutes a ship's service appears to be a logical one to adopt in determining the work traditionally done by seamen. It is the test suggested by the language of *Sieracki* (328 U.S. at 93-97), which repeatedly adverts to the fact that unseaworthiness liability arises "as an incident . . . of performing the ship's service with the owner's consent." See also, *Crumady* v. *J. H. Fisser*, 358 U.S. 423.

For its statement that, "historically the work of loading and unloading is the work of the ship's service," the Court in *Sieracki* cited early decisions on maritime liens, which adopt a similar criterion. If the work done for the vessel is maritime in nature, it gives rise to a lien; if not, it does not. And whether the work is maritime in turn depends upon performing a service for the vessel with the owner's consent, even if performed on land, as in *The Seguranca*, 58 F. 908 (D.C.) or *The Onore*, 6 Ben. 564; Fed. Cas. No. 10,538.

The decision of the Court of Appeals in this case could introduce serious confusion into this area of litigation. Even though petitioner proved to the satisfaction of the trier of fact that he was performing the ship's service in loading the vesel, he was held not entitled to recover because he failed to introduced any evidence as to what seamen "traditionally" did. So far as petitioner's research has disclosed, no opinion of this or any other court has required such evidence. If such evidence is to be required, what is the criterion by which it should be judged? The Court of Appeals gives no indication what evidence would meet this burden it imposes.

Conflict with Decision of this Court

The principal reason for overturning the trial court's finding of negligence appears to be that petitioner did not introduce expert testimony to establish a standard of conduct for inspection (R. 598). The device which failed was a simple one (R. 64-65), pictured in Figure 2 of the trial court's opinion (R. 26) (189 F. Supp. at p. 105) following p. 40 of the Appendix, *infra*. When the pawl fell into the notches, as it was supposed to do, the drum could not turn and the boom could not fall. The pawl was jammed, and had been jammed for more than a day. If it was jammed, the fact should have been immediately apparent when the boom was raised the previous day. The trial court determined that the respondent should have discovered the defect. It is submitted that this was within his province, and that the decision of the Court of Appeals to

the contrary is directly in conflict with the decision in *Salem* v. *U. S. Lines*, — U.S. —, 8 L. ed. 2d 313 (May 28, 1962).

In that case, the Court held that where a simple device was involved, expert testimony was not necessary to enable a jury to decide whether it was reasonably safe for use, and, if there were reasons not immediately apparent, which prevented making the device safe, the burden was upon the defendant to establish them.

Precisely the same rule should apply. The trial court, fully understanding the nature of the device in question, held that a reasonable inspection should have disclosed its malfunctioning, known to the longshoremen the day before (R. 22). He was entitled to reach this conclusion without the aid of expert testimony. He could, for example, have concluded that it was the duty of the seamen to make inquiry of the longshoremen regarding the condition of this safety device.

Conflicts in Principle with Decisions of Other Courts of Appeal

Every other Court of Appeals which has considered the applicability of the doctrine of unseaworthiness to longshoremen engaged in loading or unloading the vessel, but working on the dock, has concluded that the doctrine is applicable. *Strika* v. *Netherlands Ministry of Traffic*, 185 F.2d 555, 556-558 (C.A. 2, 1950); cert. den. 341 U.S. 904; *Hagans* v. *Farrell Lines*, 237 F.2d 477 (C.A. 3, 1956); *Klimaszewski* v. *Pacific-Atlantic Steamship Co.*, 246 F.2d 875 (C.A. 3, 1957) (longshoreman on barge); *American Export Lines, Inc.* v. *Revel*, 266 F.2d

82, 86 (C.A. 4, 1959). A completely different panel of the Ninth Circuit went out of its way to hold that the doctrine was applicable to a dock-working longshoreman, whether aboard the ship or on the dock. *Pope & Talbot, Inc.* v. *Cordray*, 258 F.2d 214, 217-218 (C.A. 9, 1958).

The District Courts have been equally unanimous. *Valerio* v. *American President Lines*, 112 F. Supp. 202 (S.D. N.Y., 1952); *De Van* v. *Pennsylvania Railroad Co.*, 167 F. Supp. 336, 342 (E.D. Pa., 1958) (longshoreman on carfloat); *Di Salvo* v. *Cunard Steamship Co.*, 171 F. Supp. 813, 819 (S.D. N.Y., 1959); *Litwinowicz* v. *Weyerhaeuser Steamship Co.*, 179 F. Supp. 812 (E.D. Pa., 1959); *Robillard* v. *A. L. Burbank & Co.*, 186 F. Supp. 193, 195-196 (S.D. N.Y., 1960). See also, *McKnight* v. *N. M. Patterson, Ltd.*, 181 F. Supp. 434, 438, n. 5 (N.D. Ohio, 1960) (dictum).

Because of the ambiguous nature of the decision here, it cannot be said to be squarely in conflict with any of the foregoing. The Ninth Circuit refrained from laying down a "fixed line of demarcation" between seamen's work and shoreside work; instead it appears to distinguish between those to whom the warranty is available as a matter of law, and petitioner, who was beyond the pale because he had not *proved* that he was entitled to the protection of the warranty.

Insofar as none of the foregoing decisions appears to have required a dock-working longshoreman to prove that his work was traditionally that of seamen, it may be said that this decision is in conflict. Since it is entirely

impossible to tell from the opinion of the Court of Appeals what evidence petitioner lacked or whether any amount of evidence would have changed its opinion, little more can be said concerning conflict, except that a reading of all the foregoing opinions cannot help but leave the impression that the Courts of Appeal above cited would not have arrived at the result reached in this case.

Two recent decisions of District Courts in the Third Circuit appear to present direct conflicts with the decision here. *Hagans* v. *Ellerman & Bucknall Steamship Co.*, 196 F. Supp. 593 (E.D. Pa., 1961), is presently pending on appeal and is expected to be argued in the fall. Plaintiff there worked beyond the reach of ship's tackle, but the court held that he was in the ship's service and was entitled to a warranty of seaworthiness. It does not appear that there was any evidence introduced that members of the crew in former times did the type of work which plaintiff there was doing.

The other case, *Fitzmaurice* v. *Calmar S. S. Co.*, 198 F. Supp. 304 (E.D. Pa., 1961), is awaiting trial, and also involved a longshoreman working beyond the reach of ship's tackle.

The Decision Below Is Erroneous

Enough has already been said to indicate generally the errors which petitioner asserts that the Court of Appeals has committed. If the question of whether or not petitioner was entitled to the warranty is one of fact, the trial court's factual decision that petitioner

was engaged in the ship's service in loading its cargo is amply supported by evidence. If it is one of law, the Court of Appeals is in error in holding that the petitioner failed to meet his burden of proof. In any event, neither in the *Sieracki* case, nor in subsequent cases, has it been necessary for a shore-based workman claiming the benefits of the doctrine of unseaworthiness to introduce expert testimony as to the traditional work of seamen. The suggestion that such a battle of experts is necessary to decide an issue of this kind is an extremely undesirable development of the law in this area.

On the issue of negligence, the Court of Appeals has once again invaded the trial court's domain, to hold that he could not reasonably have decided that respondent should have discovered the defect, because he had no expert testimony to establish the standard of conduct. The error in this ruling has already been discussed. Respondent could have discovered the defect itself, or could have made inquiry of the longshoremen who knew of it.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 30, 1962